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No. 46

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1958

JAMES E. PEURIFOY, PAUL V. STINES and BETTY O. STINES, JOHN S. HALL and DORIS D. HALL,
*Petitioners,*

v.

COMMISSIONER OF INTERNAL REVENUE, *Respondent.*

**On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit**

## REPLY BRIEF FOR THE PETITIONERS

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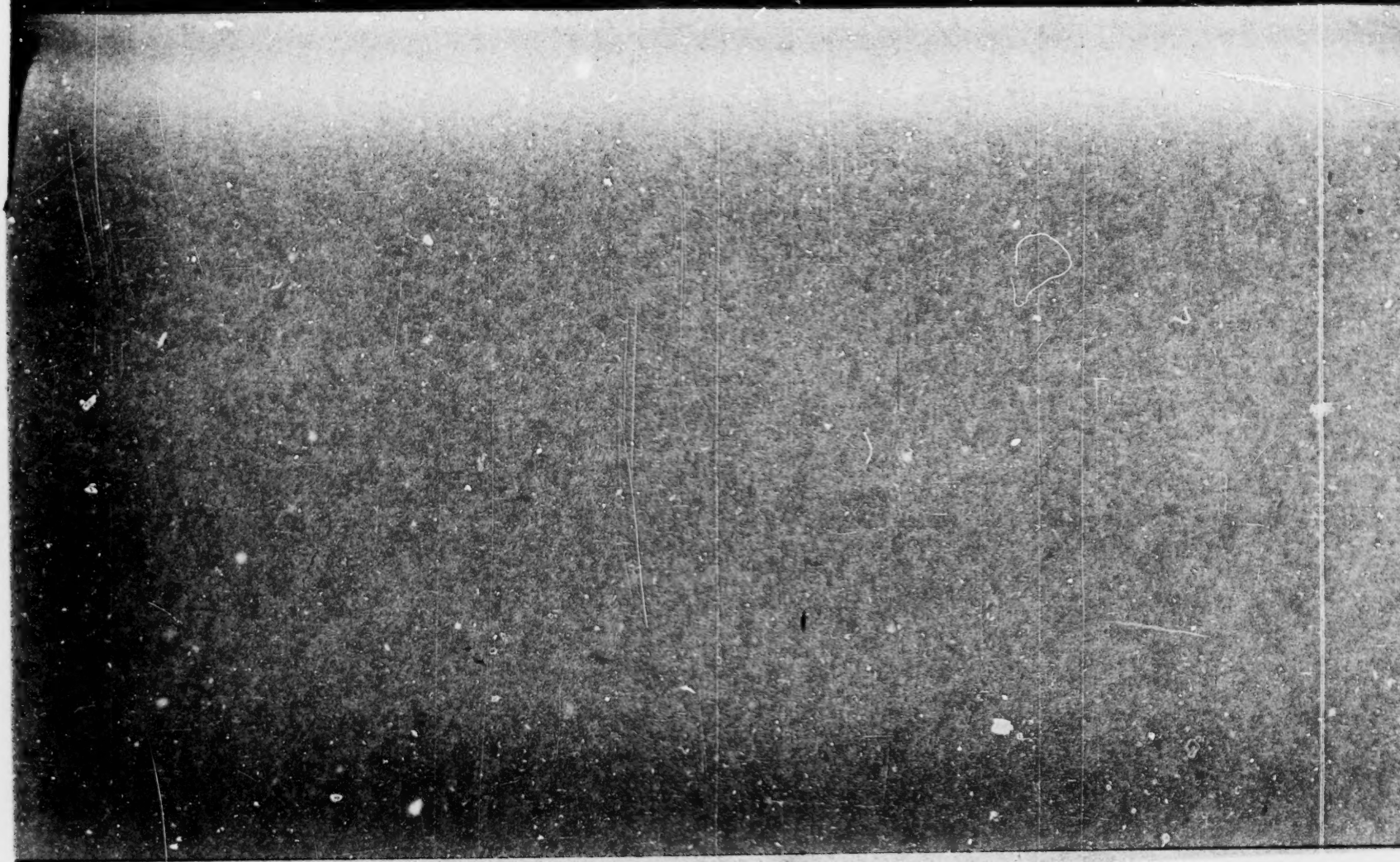

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## REPLY BRIEF FOR THE PETITIONERS

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### ARGUMENT

**In Reply to Certain Allegations on Pages 10 and 11 of Respondent's Brief:**

On pages 10 and 11 of his brief respondent asserts:

> "... The view that 'home' must be read literally as the place where taxpayer may choose to reside; irrespective of the location of his post of duty, would produce the incongruous result that subsistence and commuting expenses would remain nondeductible under Section 24 if the taxpayer

> had his living quarters in the locality of his post of duty, but would be transformed into deductible business traveling expenses under Section 23 if he chose to maintain, in addition to living quarters in the neighborhood of his business, separate living quarters elsewhere which he regarded as his residence."

This assertion is an entire distortion of petitioner's position. Expenses incurred as a result of the "choice of" a taxpayer in having a home distant from his employment are not deductible under petitioners' theory. In this respect petitioners said (Pet. Brief, p. 32):

> ". . . The legal conclusion that such expense is nondeductible then attaches immediately by force of Section 24(a)(1), *if* the expense be classified as 'personal' in the sense that it is incurred as the result of the 'choice of' or 'personal propensities of' the taxpayer."

Respondent's assertion assumes that the principles controlling the nondeductibility of commuting expenses should be applied to the instant problem. Commuting expenses and traveling expenses are two entirely different things as is evidenced by the fact that commuting expenses are not deductible and traveling expenses (as defined in Section 23) are deductible. Both types of expenses require physical movement away from one's residence. This does not transform traveling expenses into commuting expenses as asserted by respondent. Each class of expenses is controlled by separate principles of law. It is neither necessary nor proper to equate traveling expenses with commuting expenses. It *is* necessary that a particular physical movement from a residence be classified as a commut-

ing expense or a traveling expense. This latter question is not before this Court in this proceeding.

How is one to decide when a taxpayer is maintaining a home distant from his place of employment from "personal choice"? It is submitted that this question must be decided on the basis of all the pertinent facts. To say that *James R. Whitaker* in 24 T.C. 750 maintained a home offshore of Thule, Greenland as a matter of personal choice is a travesty of logic. Yet the same logic implemented in this proceeding was used to deny Whitaker a deduction. The instant petitioners do not maintain homes distant from their employments as a matter of "personal choice".

**In Reply to Certain Allegations on Page 11 of Respondent's Brief:**

On page 11 of his brief respondent refers to certain "exceptions" to the applicable principles of law, saying:

> ". . . Upon the general rule, however, has been engrafted an exception which the Tax Court applied in the instant case."

The decision of the Court of Appeals below referred to such exception saying (R. 38):

> ". . . If we assume the validity of this exception to the rule of *Commissioner* v. *Flowers* as applied to one not self employed, it is essential that the employment away from the established tax home shall be temporary in contemplation at the time of its acceptance and not indeterminate in fact as it develops."

This Court laid down three requirements for deductibility of travel expenses in *Commissioner* v. *Flowers*, 326 U. S. 465. As a matter of legal jurisprudence, there can be no exceptions to the mandate of this Court if the matter in issue is within the orbit of its decision.

**In Reply to Certain Allegations on Pages 14 and 15 of Respondent's Brief:**

On page 14 of his brief respondent states:

> "... In their extensive brief on the merits, however, the taxpayers apparently do not defend the *Wallace* view, which, as we shall show (*infra*, pp. 17-19), has atrophied from lack of acceptance and disuse."

This assertion by respondent seems strange indeed when the subject matter of the brief of the petitioners is unquestionably based on the premise that the doctrine that "home is synonymous with post of duty" is erroneous. On page 42 of petitioners' brief the following statement appears:

> "The glaring fallacy in the doctrine that 'home is synonymous with post of duty' is revealed by the manner in which the courts have applied it to the problems raised by Section 23(a)(1)(A) ... The words of the statute when compared with the words in this doctrine are exact opposites. The doctrine that 'home is synonymous with post of duty' reduces the simple phrase 'away from home in pursuit of a trade' found in the statute to senseless jargon."

In the case of *Wallace* v. *Commissioner*, 144 F. 2d 407, 410-411 the court said:

> "Our first inquiry is to ascertain whether there is any indication of an intention by Congress to employ the expression 'away from home in the

pursuit of a trade or business' in the legislation under consideration other than according to the ordinary and usual meaning of the words used. The plain, obvious and rational meaning of a tax statute is always to be preferred to any narrow or hidden sense that nothing but the exigency of a hard case justifies, and while the meaning to be given to terms used will be determined from the character of their use by the legislature in the statute under consideration, words in common use should not be distorted by administrative or judicial interpretation. This is, in effect, what has been done by the Commissioner and sustained by the Tax Court."

* * * * *

". . . On the other hand, to judicially innovate a meaning of 'home' as the taxpayer's 'place of business, employment, or the post or station at which he is employed', as the Tax Court has done, would, we think, operate to thwart the obvious purpose of Congress to tax *net* income and would in many cases tax the gross instead of the net income of individuals."

The above quotations disclose the complete agreement of petitioners with the *Wallace* decision. The propheey therein that the doctrine that "home is synonymous with post of duty" would result in the taxing of gross income instead of net income has been abundantly fulfilled (See numerous cases in Appendices E and F of Brief for Petitioners at pages 8a and 11a).

Admittedly the *Wallace* decision has not been frequently followed. It is to be noted that appeals are expensive and that the class of taxpayers here involved could ill afford to prosecute their claims beyond a Tax Court hearing, or for that matter even in the Tax Court. Many of the cases are pro se cases including

the important decisions of *James R. Whitaker*, 24 T.C. 750 and *Albert P. Tiernan*, P-H T.C. Mem. Dec., Par. 55,059.

Truth and right reason can never atrophy though frequently obscured for an unseemly long time. It is my belief the *Wallace* decision reflects the truth and right reason of this situation.

**In Reply to Certain Allegations in Footnote on Pages 14 and 15 of Respondent's Brief:**

In the footnote 2 on page 14 of his brief respondent states:

> "The Court of Appeals (R. 38)—correctly, we believe—interpreted this Court's decision in *Flowers* to hold that, in order to qualify for the travel expense deduction under Section 23(a)(1)(A), the travel of a taxpayer who is an employee must be in pursuance of the employer's business."

This position of respondent is clearly rebutted by the language of this Court in the *Flowers* case when it said (326 U. S. at p. 470):

> "(3) The expense must be incurred in pursuit of business. This means there must be a direct connection between the expenditures and the carrying on of the trade or business *of the taxpayer or of his employer.*" (Emphasis added).

This position of the respondent is further rebutted by the fact that respondent concedes that the expenses in question are deductible if the employment is "temporary". The relationship of the taxpayer to his job in these cases is the same, irrespective of the duration

of the employment. In his statement of facts, respondent states (Resp. Brief, p. 2):

> "... They all obtain employment through their local union, which sends them to various work sites where they are then hired by the employer (R. 19)."

This is true in respect to employments categorized as "temporary" as well as those categorized as "indefinite". Yet in respect to temporary employments, respondent admits such hiring procedure does not disqualify petitioner for the deduction.

The allegation in this footnote that the travel "was of no benefit to their employer" is not true. In his statement of facts respondent states (Resp. Brief, p. 3):

> "... Where a job requires more skilled craftsmen than a local union has available in the area, the local union will deal with other local unions in the same state or other states in order to procure the *necessary* workers." (Emphasis added).

The mobility of workers as a necessary and essential characteristic of the construction industry stands admitted. Mobility requires travel with resultant expense and provides an unquestioned benefit to the employers.

**In Reply to Certain Allegations on Pages 15 and 16 of Respondent's Brief:**

On pages 15 and 16 of his brief respondent states:

> "... On this question of the substantiality of the evidence, it is abundantly clear, as we shall also show (*infra*, pp. 27-32), 'that the Court of Appeals has made a "fair assessment" of the record'

> (*Federal Trade Commission* v. *Standard Oil Co.*, 355 U. S. 396, 401), which, we submit, should not be independently reexamined by this Court."

Petitioners submit that the Court of Appeals below gave *no* consideration to the substantiality of the evidence. The conclusion of the Court of Appeals below was based entirely on the proposition that a "place of temporary employment is not a tax home but that a place of indefinite employment is a tax home".

The expenses in question were originally disallowed by the Commissioner because the expenses in question were personal. The issue thus raised falls exclusively under the provisions of Section 24(a)(1). The Commissioner did not maintain in his statutory notice that any of the three requirements of the *Flowers* case had not been met. Thus, it is apparent that in a strict technical sense, the issues raised by Section 23(a)(1)(A) *ought not be before this Court.* The expenses were disallowed under Section 24(a)(1) only. There was no allegation in his 90-day notice of disallowance for failure to meet any of the three requirements of *Flowers.*

Respondent in his brief states (Resp. Brief, p. 10):

> "... In the Commissioner's view, the taxpayers here are not entitled to the deductions claimed as travel expenses because they were not incurred 'away from home'."

Since the original grounds for disallowance are based exclusively on the Commissioner's position that the expenses were personal—a problem created by Section 24(a)(1) —it requires a considerable effort to understand how the expenses were disallowed because of the above allegation by the Commissioner that the ex-

penses were not incurred "away from home"—a problem raised by Section 23(a)(1)(A).

Two fundamental errors of logic produce this result. The first error is in assuming that an expense is "personal", as the word is used in Section 24(a)(1), because such expense is nondeductible under 23(a)(1)(A). This problem logically requires an independent factual determination as shown in petitioners' brief. (Pet. Brief, p. 25).

The second error arises by applying the doctrine that "home is synonymous with a post of duty or an indefinite post of duty". The application of this doctrine is applied as a matter of substantive law by the Court of Appeals below thereby producing automatic disallowance of the expenses under Section 23(a)(1)(A). Once the employment is classified as "indefinite" (for any one of the numerous reasons advanced by respondent) consideration of the facts in respect to the three requirements of the *Flowers* case is made impossible.

It is submitted that the decision of the Court of Appeals below is not based on an evaluation of the evidence but on the application of the erroneous principles of law as above described.

**In Reply to Certain Allegations on Pages 16 and 17 of Respondent's Brief:**

On pages 16 and 17 of his brief respondent states:

> "As the Court noted in *Flowers*, the administrative rulings, dating from 1921, have treated the statutory home as the abode at the taxpayer's post of duty. The same has been true since *Flowers*. Likewise the Tax Court, both before and after *Flowers*, has consistently followed the administrative interpretation in a wide variety of factual

> situations. Under the circumstances, and in view of the repeated reenactment of the business traveling expense provision in successive revenue acts, the Treasury's interpretation must be deemed to have received implied legislative approval. *Commissioner* v. *Flowers, supra* at 469; . . ."

This Court did not see fit to use this argument to sanction the doctrine that "home is synonymous with post of duty" in the *Flowers* case. Rather, it carefully and specifically refrained from sanctioning the doctrine.

The doctrine that reenactment of a statute which has received administrative interpretation is considered to be given implied legislative approval of such interpretation is subject to well known exceptions. No amount of legislative re-enactment of a statute will validate an unreasonable practice in interpreting it. *Titsworth* v. *Commissioner,* 73 F. 2d 385, (3rd Cir. 1934). Nor will the doctrine of legislative reenactment validate an administrative interpretation which is contrary to the terms of the statute. *F.H.E. Oil Co.* v. *Commissioner,* 147 F. 2d 1002 (5th Cir. 1945). The Secretary of the Treasury cannot by his regulations alter or amend a revenue law. All he can do is regulate the mode of proceeding to carry into effect what Congress has enacted. *Morrill* v. *Jones,* 106 U.S. 466 (1883); *Allis* v. *LaBudde,* 128 F. 2d 838 (7th Cir., 1942). A subsequent reenactment of a provision which is not ambiguous will not make a regulation controlling which makes a strained construction of the provision. *Busey* v. *The Deshler Hotel Company,* 130 F. 2d 187 (6th Cir. 1942).

In the instant case the doctrine that "home is synonymous with post of duty or indefinite post of

duty" goes far beyond "interpretation" of an act of Congress but seeks to erect a rule of law independent of and in conflict with the statutory enactment.

**In Reply to Certain Allegations in Footnote on Page 18 of Respondent's Brief:**

In footnote 9 on page 18 of his brief respondent states:

> "The citation of *Flowers* in these opinions demonstrates that, although the decision in *Flowers* was actually placed on the ground that the travel of taxpayer there was not in pursuit of the business, it has also come to stand for the proposition that a taxpayer, in order to qualify for the travel expense deduction, must be away from his regular post of duty—*i. e.*, his 'home'."

This Court specifically refused to rule on this point in the *Flowers* case saying (326 U. S. at p. 471):

> "We deem it unnecessary here to enter into or decide the conflict."

How then, could the *Flowers* case "come to stand for" something it specifically refused to rule upon? The answer, of course, is that such result could only come about by misinterpretation and misapplication of the *Flowers* decision. This was dramatically indicated in this proceeding when respondent characterized certain grounds in the taxpayers' petition for a writ of certiorari as being "patently without merit" saying (Brief For Resp. In Opposition, p. 8):

> ". . . In *Flowers* this Court (p. 472) expressly refrained from deciding the meaning of 'home' in Section 23(a)(1)(A)."

It was the Court of Appeals below which improperly cited the *Flowers* case in support of its position, not the petitioners herein as was assumed by the respondent when he classified the grounds for the petition as "patently without merit".

In footnote 11 on page 18 of his brief, respondent states:

> "Taxpayers are of course in error in asserting (Br. 37-38) that a holding that the post of duty is the tax 'home' disqualifies every taxpayer for a deduction for travel expenses."

Respondent's assertion fails to show that petitioners' statement referred to a *literal* application of the doctrine that "home is synonymous with post of duty" would result in denial of the deduction to every taxpayer. Petitioners are not in error on this point. Applied in a literal sense a "post of duty" is anywhere a person happens to be working at a particular time. Ignoring for a moment the element of time, a person can never be away from home at work if where he works, which is his post of duty, is his home.

In order to salvage the doctrine from reaching the results indicated, it has been necessary to create the "temporary versus indefinite" concept which holds that a short lasting post of duty is not a "post of duty" hence is not taxpayers' home. Ergo, he is away from home. However, a longer lasting post of duty is a "post of duty" and is a "tax home". For tax purposes, taxpayer can never be "away from" this latter home under respondent's theory.

Respondent seeks to explain the absence of logical explanation for the existence of such an exception by saying (Resp. Brief, p. 23):

> ". . . The exception is ameliorative in nature, and is apparently based on the theory that it is inequitable to call the post of duty the tax 'home' if the taxpayer, being there only temporarily, is forced by economic circumstances to maintain a residence elsewhere."

**In Reply to Certain Allegations on Page 19 of Respondent's Brief:**

On page 19 of his brief respondent states:

> "Logis (*sic*) as well as authority requires the definition of 'home' which the Commissioner and the lower courts generally have adopted. Despite taxpayers' effort (Br. 17-32) to separate consideration of Section 23(a)(1)(A) of the 1939 Code from the omnibus disallowance of deductions for personal and living expenses in Section 24(a)(1) (Appendix, *infra*, p. 36), this Court has said specifically that the former section 'is to be contrasted with' the latter. (*Commissioner* v. *Flowers*, *supra*, at p. 469)."

Petitioners submit that their proposal that separate and independent consideration be given to the problems raised by Section 24(a)(1) and those raised by Section 23(a)(1)(A) does not conflict with the statement of this Court in the *Flowers* case that the two sections are to be contrasted. Instead, it accomplishes this purpose. It is respondent's theory that confuses the issue by attempting to solve the issues raised by both sections simultaneously. This cannot be done logically. Congress enacted two separate sections in the law and they logically require separate consideration in their proper order. Disposition of the issues raised by Section 24(a)(1) is a logical step which should precede consideration of the issues raised by Section 23(a)(1)(A). (Fully developed in Pet. Brief, p. 17).

**In Reply to Certain Allegations on Page 20 of Respondent's Brief:**

On page 20 of his brief, respondent states:

> ". . . It (Section 23(a)(1)(A)) is designed to extend relief to a taxpayer who in pursuit of his trade or business must travel temporarily or intermittently away from the locality which is his regular post of duty."

The statute itself provides the best rebuttal to this assertion. The statute does not require that the travel be temporary or intermittent nor does it require that it be away from his regular post of duty. The statute provides for the deduction of—

> "All the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business, including . . .; traveling expenses (including the entire amount expended for meals and lodging) while away from home in pursuit of a trade or business."

In enumerating the three requirements in the *Flowers* case this Court did not require temporary employment as a condition of deductibility or specify that such employment must be away from a post of duty.

On page 20 of his brief respondent further states:

> ". . . Were a taxpayer's expenses for meals and lodging at the locality of his post of duty and in commuting to and from it held deductible, the legislative mandate in Section 24 would be frustrated."

Petitioners repeat that their position does not assert that commuting expenses are deductible. There is a well recognized distinction between commuting expenses and traveling expenses as is evidenced by the

fact that Section 23(a)(1)(A) permits the deduction of traveling expenses but does not permit the deduction of commuting expenses. Respondent seeks to (148 F. 2d 913 (4th Cir., 1945)) by determining the problem of deductibility of travel expenses under the principles applicable to commuting expenses. This is not proper.

The fallacy in respondent's position as above asserted is shown by the fact that expenses for meals and lodging at the locality of his "temporary" post of duty are admittedly deductible and this apparently does not "frustrate" the mandate of Section 24.

Respondent fails to grasp that an unnecessary expense resulting from the "personal choice" of a taxpayer who keeps his home distant from his employment for "personal reasons" is struck down by Section 24(a)(1) without the necessity of referring to Section 23(a)(1)(A) or invoking the doctrine that "home is synonymous with post of duty".

The assertion that taxpayers of the type here involved "chose" to keep their homes distant from their place of employment as a matter of personal choice is untrue. Taxpayers must incur double expenses by such travel which are not alleviated entirely by allowing them a tax deduction as respondent seems to feel. These men must absent themselves from their wives and children for extended periods while engaging in a hard and frequently hazardous occupation. This way of life is not the result of the "choice of" these petitioners. It is occasioned by the exigencies and needs of their trade. It is neither fair nor just

to increase the hardships upon a class of men who are performing a vital and essential function for a major industry of this country by depriving them of the benefits of a tax deduction to which they are legally entitled.

**In Reply to Certain Allegations on Page 22 of Respondent's Brief:**

On page 22 of his brief respondent states:

> "As demonstrated above, if the location of a taxpayer's family residence were generally determinative, every commuter would be entitled to the deduction."

This position of respondent has no justification. The statute specifically allows a deduction for traveling expenses. It does not do so for commuting expenses. The distinction between traveling expenses and commuting expenses is subject to ascertainment without any more difficulty than many other problems our courts deal with daily.

There are no words in the statute specifically granting a deduction for commuting expenses as contrasted with the situation in respect to traveling expenses which are specifically deductible. They have never been recognized as ordinary and necessary business expenses and there is neither statute nor case precedent to permit their deduction.

**In Reply to Certain Allegations in Footnote on Page 22 of Respondent's Brief:**

In footnote 15 on page 22 of his brief respondent states:

> "Taxpayers' suggestion (Br. 29) that commuting expenses are not 'personal' expenses within the

> meaning of Section 24(a)(1) is clearly refuted by *Commissioner* v. *Flowers, supra*, p. 473: 'Had his post of duty been in that city the cost of maintaining his home there and of commuting or driving to work concededly would be non-deductible living and personal expenses lacking the necessary direct relation to the prosecution of the business'."

Petitioners' position in respect to this seeming conflict in positions is stated as follows (Pet. Brief, p. 31):

> "Thus the classification of commuting expenses as 'personal' as above described is a legal conclusion that such expenses are nondeductible. As thus used, the term indiscriminately embraces those expenses which result from the 'choice of' or 'personal propensities of' the taxpayer and those which are deemed nondeductible under various legal concepts."

From the language quoted from the *Flowers* case it is manifest that this Court was applying the word "personal" in the sense that a *legal* conclusion such expenses were nondeductible. In this respect petitioners stated (Pet. Brief, p. 30):

> "A clearer understanding of the nature of commuting expenses would have resulted if such expenses had been described as 'nondeductible business expenses'. Such a description would not have obscured the element of choice of a taxpayer in incurring such expenses."

Thus, in this *factual* sense, commuting expenses are *not* incurred as a result of the "personal choice" of the taxpayer.

**In Reply to Certain Allegations on Pages 25 and 26 of Respondent's Brief:**

On page 25 of his brief respondent states:

> "To bring himself within the exception and prove that his employment is temporary, a taxpayer, according to the criteria applied by the Tax Court in numerous cases, must show not only that the employment period is actually short, but also that, prior to its commencement, it was anticipated to be short."

It is submitted that this statement alone reveals the fallacy in respondent's position. On page 13 of his brief respondent pays lip service to the requirements of deductibility *in Flowers* saying:

> "In *Commissioner* v. *Flowers,* 326 U. S. 465, this Court enumerated three basic requirements which must be satisfied before a traveling expense deduction may be allowed under Section 23(a)(1)(A) of the Internal Revenue Code of 1939 (Appendix, *infra,* p. 35). These requirements are (p. 470):
>
> (1) The expense must be reasonable and necessary traveling expense, as that term is generally understood. This includes such items as transportation fares and food and lodging expenses while traveling.
>
> (2) The expense must be incurred 'while away from home'.
>
> (3) The expense must be incurred in pursuit of business. This means that there must be a direct connection between the expenditure and the carrying on of the trade or business of the taxpayer or of his employer. Moreover, such an expenditure must be necessary or appropriate to the development and pursuit of the business or trade."

The requirements of deductibility established by respondent in the quotation above erect additional and entirely different standards of deductibility from those established by this Court. Such result could only come about by creating new rules of substantive law which are not sanctioned by this Court or found in the statutes.

On page 26 of his brief respondent refers to the described requirements he has set forth on page 25 of his brief, saying:

> "Accepting these legal criteria as controlling, the only question there is their application to particular."

It is submitted that this position of respondent *ignores* the controlling authority of *Commissioner* v. *Flowers* and erroneously assumes the validity of a set of legal requirements in addition to those specifically established by this Court.

**In Reply to Certain Allegations on Page 27 of Respondent's Brief:**

On page 27 of his brief respondent states:

> ". . . Since the decision turns upon a question of fact, this Court, under principles recently reaffirmed, need go no further than determine that the Court of Appeals has made a 'fair assessment' of the record."

As previously noted, petitioners submit that the Court of Appeals gave *no* consideration to the substantiality of the evidence. (See discussion herein in reply to allegations on pages 15 and 16 of respondent's brief).

**In Reply to the Allegations on Pages 28-30 of Respondent's Brief:**

On page 28 of his brief respondent states:

> "Taxpayers did not show that the actual duration of the jobs was short."

Neither the statute nor the *Flowers* case require compliance with the quoted statement as a condition of deductibility. The actual duration of the period of employment was stipulated to by the parties. No other evidence of the length of the employment period was necessary. What is a "short" period of time? There are many cases which have allowed the deduction for travel for periods longer than 8½ months. (See App. H, p. 14a of Pet. Brief). Further, is the basic necessity of the travel to be resolved on the sole issue of the length of the employment period? If so, what significance can be attached to all the other evidence bearing on the necessity of the travel? What implementation is to be made of the mandate of this Court that said (326 U.S. 470):

> "Whether particular expenditures fulfill these three requirements so as to entitle a taxpayer to a deduction is purely a question of fact in most instances."

On pages 28 to 30 respondent refers repeatedly to the fact that petitioners on several occasions voluntarily quit their jobs. He argues that such acts categorize the expenses as personal. The aspects of the original essentiality of the travel arise when the travel is *initiated,* not when it is *terminated.* The spuriousness of this argument is further revealed by respondent's argument that the period of employment should ripen into indefinite employment which will produce a forfeiture

of the deduction if taxpayer continues to work until job completion. Respondent's argument would produce such result irrespective of the degree of justification taxpayer would have for not moving his home to the job site (e.g., *James R. Whitaker,* 24 T.C. 750).

The constitutional law aspects for penalizing a taxpayer who quits his job by denying him a tax deduction to which he might otherwise be entitled have been fully developed in petitioner's brief. (Pet. Brief, p. 56).

It is submitted that the instant petitioners do *not* leave their homes as a matter of personal choice but do so out of the necessity of following their trades. In respect to petitioner Peurifoy, respondent stated (Resp. Br. p. 3):

> "... He actually resides there (his home) when he is employed in the vicinity of Wilmington and returns to this residence on week-ends if the place of employment is within a reasonable distance."

Why would Peurifoy return to his residence on week-ends if he worked elsewhere as a matter of personal choice? Why would he have left his home in the first place if his work did not require him to do so?

**In Reply to Allegations on Pages 30-32 of Respondent's Brief:**

On page 25 of his brief respondent states:

> "2. Taxpayers did not show that the jobs were anticipated to be of short duration"

Neither the statute nor the *Flowers* case requires compliance with the quoted statement as a condition of deductibility. In this respect the record produced ample evidence of the nature of the employments of the respective petitioners and the multitude of con-

struction projects on which they work. Absent some extraordinary factor, construction work, by its very nature is temporary. Upon completion of the construction work, both employers and employees alike must seek work elsewhere. Neither the Tax Court nor the Commissioner maintain that the home of the employer-contractor is at the construction site.

On page 21 of his brief he says: "A desire for equality among taxpayers is to be attributed to Congress, rather than the reverse." Where is the inequality? The employer-contractor knows he will be on the job from beginning to end. The craftsman's period of employment is subject to many hazards. Discharge, strikes, material shortages or the nature of his work may require termination of his employment long before the work is completed. However, it is the employee, whose period of employment away from home will average much shorter than that of his employer, who is being denied the deduction.

Such employees know for a certainty that their employment at a construction site will terminate in a relatively short period of time.

## CONCLUSION

From the foregoing, petitioners respectfully submit that the position of the respondent is not valid and that the judgment of the Court of Appeals below should be reversed.

Respectfully submitted,

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